18 Brief 125
Brief prepared
Asa Jenkins Hand

SUPREME COURT OF THE UNITED STATES.

No. ~~599.~~ 356 180

THE UNITED STATES, PLAINTIFFS,

vs.

THOMAS W. BUZZO.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JANUARY 26, 1872.

Oct Term 1872

1 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

At a session of the circuit court of the United States, begun and held at Detroit, for the eastern district of Michigan, on Saturday, the ninth day of December, in the year of our Lord one thousand eight hundred and seventy-one, and in the ninety-sixth year of American independence—

Present, Honorable Holmer H. Emmons, circuit judge, and Honorable John W. Longyear, district judge.

Brugh. 2, 371, S. 332
v 377. ss. 357, 85, Bagley, [70]
in Mich Court

THE UNITED STATES OF AMERICA
vs.
THOMAS W. BUZZO.

This is a criminal information filed by the United States district attorney in the words and figures following:

2 UNITED STATES OF AMERICA,
Eastern District of Michigan, to wit:

Be it remembered that at a term of the district court of the United States for the eastern district of Michigan, begun and held at Detroit, in the said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and seventy, A. B. Maynard, esq., district attorney for the United States for the district aforesaid, who in this behalf prosecuteth in the name of the United States and for the said United States, comes here into the said court, on this twenty-eighth day of February, in the year of our Lord on' thousand eight hundred and seventy-one, being one of the days of said term, in his own proper person, and, for the said United States, gives the said court here to understand and be informed that heretofore, to wit, on the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and seventy, at Calumet, Michigan, in the eastern district of Michigan, and within the jurisdiction of this honorable court, one Thomas W. Buzzo, being then and there clerk of the Calumet Mining Company, in said eastern district of Michigan, as such clerk of said company, did make, sign, and issue a certain written and printed evidence of an amount of money to be paid at a time designated, in the form of a draft drawn upon Charles W. Seabury, treasurer of said company, requesting him, said Seabury, as such treasurer, to pay to the order of said Buzzo a certain sum of money at a time designated, which said draft is hereto attached, upon which a tax is imposed by law, without the same being duly stamped or having thereon the adhesive stamp required by law for denoting the tax chargeable thereon, with intent to evade the provisions of the acts of Congress relating to internal revenue as amended by the act approved July 13, 1866, against the form, force, and effect of said acts, and against the peace and dignity of the United States.

And the district attorney aforesaid, on behalf of the said United States, gives the said court further to understand and be informed that, heretofore, to wit, on the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and seventy, at Calumet, in the eastern district of Michigan, and within the jurisdiction of this honorable court, one Thomas W. Buzzo, being then and there clerk of the Calumet Mining Company, as such clerk of said company, did sign a certain written and printed evidence of an amount of money to be paid at a

time designated, in the form of a darft drawn upon Charles W. Seabury, treasurer of said company, requesting him, said Seabury, as such treasurer, to pay to the order of said Buzzo a certain sum of money at a time designated, which said draft is hereto attached to this information, upon which a tax is imposed by law, without the same being duly stamped or having thereon the adhesive stamp required by law for denoting the tax chargeable thereon, with intent to evade the provisions of the acts of Congress relating to internal revenue as amended by the act approved July 13, 1866, against the form, force, and effect of said acts, and against the peace and dignity of the United States.

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And the district attorney aforesaid, on behalf of the said United States, gives the said court further to understand and be informed that, heretofore, to wit, on the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and seventy, at Calumet, in the eastern district of Michigan, and within the jurisdiction of this honorable court, one Thomas W. Buzzo, being then and there clerk of the Calumet Mining Company, as such clerk, did sign a certain instrument in the form of a draft drawn upon Charles W. Seabury, treasurer of said company, requesting said Seabury, as such treasurer, to pay to the order of said Buzzo a certain sum of money at a time designated, which said instrument is hereto attached and forms part of this information, upon which a tax is imposed by law, without the same being duly stamped or having thereon the adhesive stamp required by law for denoting the tax chargeable thereon, with intent to evade the provisions of the act of Congress in relation to internal revenue as amended by the act approved July 13, 1866, against the form, force, and effect of said acts, and against the peace and dignity of the United States.

Whereupon the said district attorney, in behalf of the United States, prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him, the said Thomas W. Buzzo, in this behalf, to make him answer to the United States, touching and concerning the premises aforesaid.

A. B. MAYNARD,
U. S. District Attorney for the Eastern District of Michigan.

No. 6408.] CALUMET MINING COMPANY. [10.

CALUMET, MICH'N, *June* 25, 1870.

TEN. At sight pay to my order ten dollars, value received, and charge the same to account of—

T. W. BUZZO, *Clerk.*
DELANO.

CHA'S W. SEABURY,
Treas., 114 *State street, Bos'on.*

3 (Indorsed:) U. S. district court, eastern district of Michigan. United States vs. Thomas W. Buzzo. Information for issuing unstamped instruments. Filed Feb'y 28th, 1871. S'g'd D. J. Davison, clerk. Witnesses: A. B. Maynard, U. S. attorney.

4 The defendant being arraigned pleaded not guilty to said information, and this cause coming on for trial, thereupon a jury was duly elected, tried, and sworn, sat together and heard the evidence, the arguments of counsel, and the charge of the court, and having duly considered of their verdict, upon their oaths find and say, speci'lly:

That the Calumet Mining Company was organized as a corporation under the laws of the State of Michigan, and in the year A. D. 1866 began the business of copper mining at Calumet, in Houghton County, in the State of Michigan, and within this district, and continued so engaged down to and at the time of the making and issuing the paper set forth in the information.

That, at the time of the making and issuing said paper, the defendant was the superintendant of said company, residing at its mine, and Charles M. Seabury was the treasurer of said company, residing and having his office at Boston, Massachusetts, at which place the company kept its general office and the principal part of its funds.

That the defendant made the said paper at Calumet, in said district, on the twenty-fifth day of June, A. D. 1870, in behalf of said company and in the usual course of its business.

5 That, in the fall of the year A. D. 1866, said company, by its superintendent, began to draw drafts of like tenor to the one set forth in the information, but in sums of five, ten, twenty, fifty, and one hundred dollars, and continued to do so down to the said twenty-fifth day of June, A. D. 1870. That none of those drawn for five or ten dollars were stamped, but all the others were stamped with a two cent stamp on each one. That said paper was only made and issued to pay for labor and other debts of the company incurred at the mine. That none of such paper was ever received back, taken up, redeemed, or paid by the company at the mine, or at any other place except at the treasurer's office, at Boston aforesaid. That none of it was ever received, nor did the company or the defendant have anything to do with its use after being issued as aforesaid.

That said company made and issued paper as aforesaid, amounting, on the average, to about twenty thousand dollars a month, of which, about three thousand dollars to three thousand five hundred dollars were in sums of five and ten dollars. That upon the issuing of any of said paper, notice was at once given to the office of the company

6 in said Boston. That said paper usually came to the Boston office for payment, through the banks, and about four-fifths thereof came by due course of mail, after issuing the same, and almost as soon as the notice aforesaid.

That when the defendant issued said paper he knew that a portion thereof was for a time retained in Houghton County and vicinity, and passed from hand to hand as a circulating medium, but said defendant had no other agency therein.

That said company was ready to pay, and always did pay, all of said paper on presentation at said treasurer's office in Boston.

But whether or not, upon the matters aforesaid, by the jurors so found as aforesaid, the defendant is guilty of the offence, in manner and form as in said information is alleged against him, the said jurors are altogether ignorant. And if upon all the matters and facts aforesaid, it shall seem to the court that the defendant is guilty, as he is in said information charged, then the said jurors upon their oaths say, that the said Thomas W. Buzzo is guilty in manner and form, as in said information is alleged against him. But, if upon the whole of said
7 matters it shall seem to the court that the said defendant is not guilty as aforesaid, then the said jurors, upon their oaths, say that the said defendant, Thomas W. Buzzo, is not guilty in manner and form as in the said information is alleged against him.

And thereupon came the United States, by their attorney, and moved for judgment in this case, upon the special verdict heretofore found therein, and thereupon the following question arose, to wit:

"Whether, upon the facts stated in the special verdict, the instrument set forth in the information was subject to a stamp when issued, under the internal revenue law of the United States."

Upon which question the judges are divided in opinion, thereupon the court ordered the same to be certified to the Supreme Court of the United States for their decision thereon.

H. H. EMMONS,
Circuit Judge.
JNO. W. LONGYEAR,
District Judge.

8 Circuit court U. S. for the eastern district of Michigan.

THE UNITED STATES OF AMERICA
vs.
THOMAS W. BUZZO.

I, Addison Mandell, clerk of said court, do hereby certify the above and foregoing to be a true copy of the information, plea, and special verdict, and certificate of division of opinion of the judges thereon, as appears of record in said cause.

In testimony whereof I have hereunto set my hand and the seal of said court, this nineteenth day of January, in the year one thousand eight hundred and seventy-two.

[SEAL.] ADDISON MANDELL, *Clerk.*

(Indorsed:) The United States of America vs. Thomas W. Buzzo. Certificate of division of opinion of the judges of the U. S. circuit court of the eastern district of Michigan.

(Indorsement on cover:) No. 599. The United States, plaintiff, vs. Thomas W. Buzzo. Certificate of division. E. Michigan C. C. U. S. Filed 26th January, 1872.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, *Plaintiffs*,
vs.
THOMAS W. BUZZO. } No. 130.

On a certificate of division in opinion between the judges of the circuit court of the United States for the eastern district of Michigan.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, *Plaintiffs*,
vs.
THOMAS W. BUZZO. } No. 130.

On a certificate of division in opinion between the judges of the circuit court of the United States for the eastern district of Michigan.

BRIEF FOR THE UNITED STATES.

This is a certificate of difference of opinion upon a point arising upon a criminal information filed in the eastern district of Michigan. The information alleged that the defendant had, without duly stamping the same, made and issued an instrument, of which the following is a copy:

"No. 6,408.] "CALUMET MINING COMPANY, [10.
"*Calumet, Mich., June* 25, 1870.

"At sight pay to my order ten dollars, value received, and charge the same to account of—

"TEN. "T. W. BUZZO, *Clerk.*
"DELANO.

"CHAS. W. SEABURY,
"*Treas.*, 114 *State street, Boston.*"

Upon the trial the jury found a special verdict, which, with the subsequent proceedings, was as follows:

"That the Calumet Mining Company was organized as a corporation under the laws of the State of Mich-

igan, and in the year A. D. 1866, begun the business of copper mining at Calumet, in Houghton county, in the State of Michigan, and within the district, and continued so engaged down to and at the time of the making and issuing the paper set forth in the information.

"That at the time of the making and issuing said paper, the defendant was the superintendent of said company, residing at its mine, and Charles M. Seabury was the treasurer of said company, residing and having his office at Boston, Massachusetts, at which place the company kept its general office and the principal part of its funds.

"That the defendant made the said paper at Calumet, in said district, on the 25th day of June, A. D. 1870, in behalf of said company, and in the usual course of its business.

"That in the fall of the year A. D. 1866, said company, by its superintendent, began to draw drafts of like tenor to the one set forth in the information, but in sums of five, ten, twenty, fifty, and one hundred dollars, and continued to do so down to the said 25th day of June, A. D. 1870. That none of those drawn for five or ten dollars were stamped, but all the others were stamped with a two-cent stamp on each one. That said paper was only made and issued to pay for labor and other debts of the company incurred at the mine. That none of such paper was ever received back, taken up, redeemed, or paid by the company at the mine or at any other place, except at the treasurer's office, at Boston aforesaid. That none of it was ever received, nor did the company or the defendant have anything to do with its use, after being issued as aforesaid.

"That said company made and issued paper as aforesaid, amounting, on the average, to about twenty thousand dollars a month, of which about three thousand dollars to three thousand five hundred dollars were in sums of five and ten dollars; that upon the issuing of any of said paper notice was at once given to the office of the company in said Boston; that said paper usually came to the Boston office for payment through the banks, and about four-fifths thereof came by due course

of mail, after issuing the same, and almost as soon as the notice aforesaid.

"That when the defendant issued said paper he knew that a portion thereof was for a time retained in Houghton county and vicinity, and passed from hand to hand as a circulating medium, but said defendant had no agency therein.

"That said company was ready to pay, and always did pay, all of said paper on presentation at said treasurer's office in Boston.

"But whether or not the matters aforesaid," &c.

Whereupon, "came the United States, by their attorney, and moved for judgment in this case, upon the special verdict heretofore found therein, and thereupon the following question arose, to wit:

"'Whether, upon the facts stated in the special verdict, the instrument set forth in the information was subject to a stamp when issued, under the internal revenue law of the United States.'

"Upon which question the judges were divided in opinion, and thereupon the court ordered the same to be certified to the Supreme Court of the United States for their decision thereon."

We submit that the foregoing instrument, being in effect a draft drawn by the Calumet Company upon itself, is a *promissory note*, and requires to be stamped as such. Byles on Bills, (p. 91,) former edition, [70.]

Miller *vs.* Thomson, 3 M. and G., 576, would be precisely in point, if the draft here had been drawn upon the company itself. The difference, however, is immaterial, as, by a similar argument to that by which the court in Miller *vs.* Thomson concluded that Thomas Newham, "manager," was but another designation of the "London Trades, &c., Company," upon which the draft was drawn, *here*, the court sees that "Charles W. Seabury, Treas.," is but another designation of the Calumet Company.

Or, considering the circumstances under which this paper was issued, it may, with exact propriety, be described as a "memorandum of an amount of money to be paid on demand"—which the statute requires to be stamped as promissory notes are.

GEO. H. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor General.

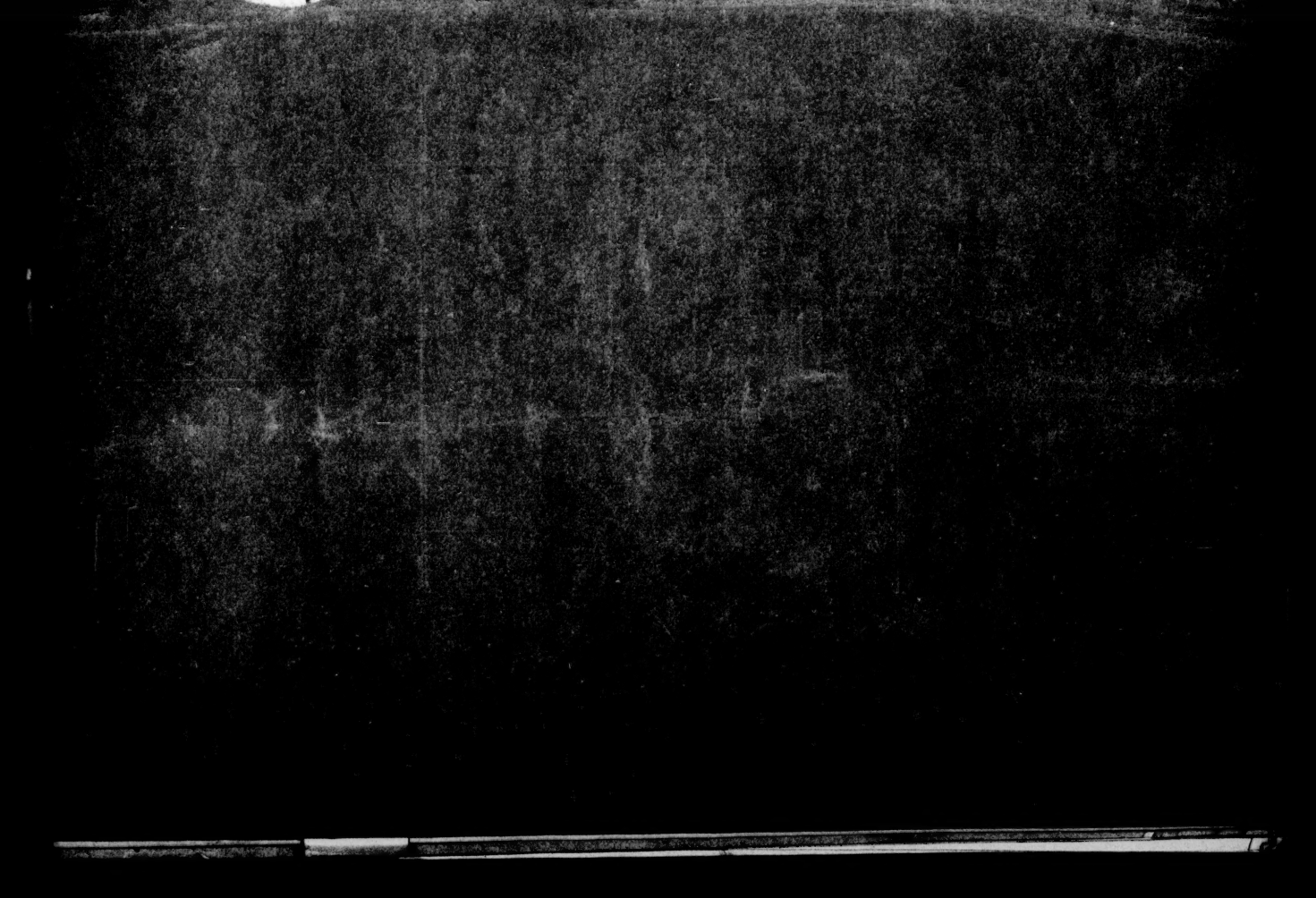
In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, PLAINTIFFS,
vs.
THOMAS W. BUZZO. } No. 130.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Brief for the United States.



In the Supreme Court of the United States.

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This is a certificate of difference of opinion upon a point arising upon a criminal information filed in the eastern district of Michigan. The information alleged that the defendant had, without duly stamping the same, made and issued an instrument, of which the following is a copy:

"No. 6408.] "CALUMET MINING COMPANY, [10.
"*Calumet, Mich., June* 25, 1870.

"At sight pay to my order ten dollars, value received, and charge the same to account of—
"TEN. "T. W. BUZZO, *Clerk.*
"DELANO.

"CHAS. W. SEABURY,
"*Treas.*, 114 *State street, Boston.*"

Upon the trial the jury found a special verdict, which, with the subsequent proceedings, was as follows:

"That the Calumet Mining Company was organized as a corporation under the laws of the State of Michigan, and in the year A. D. 1866 began the business of copper-mining at Calumet, in Houghton County, in the State of Michigan, and within the district, and continued so engaged down to and at the time of the making and issuing the paper set forth in the information.

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sums of five and ten dollars; that, upon the issuing of any of said paper, notice was at once given to the office of the company in said Boston; that said paper usually came to the Boston office for payment through the banks, and about four-fifths thereof came by due course of mail, after issuing the same, and almost as soon as the notice aforesaid.

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"That said company was ready to pay, and always did pay, all of said paper on presentation at said treasurer's office in Boston.

"But whether or not the matters aforesaid," &c.

Whereupon "came the United States, by their attorney, and moved for judgment in this case, upon the special verdict heretofore found therein; and thereupon the following question arose, to wit:

"'Whether, upon the facts stated in the special verdict, the instrument set forth in the information was subject to a stamp when issued, under the internal-revenue law of the United States.'

"Upon which question the judges were divided in opinion; and thereupon the court ordered the same to be certified to the Supreme Court of the United States for their decision thereon."

The statute upon which this information is based is that of 1866, ch. 84, sec. 9, (XIV U. S. Stat., 142,) the words of which, so far as material here, are that "any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument * * * without the same being duly stamped * * * with intent to evade the provisions of this act, shall, for every such offense, forfeit the sum of fifty dollars."

The statute regulating stamp-duties at the time the

instrument now before the court was issued, was that of 1864, ch. 173, sec. 170, Schedule B, (XIII U. S. Stat., 298,) the provisions of which, material in the present case, were:

1. BANK CHECK, draft, or order for the payment of any sum of money whatsoever, drawn upon any bank, banker, or trust company, or for any sum exceeding ten dollars drawn upon any other person or persons, companies, or corporations, at sight or on demand, two cents.

2. BILL OF EXCHANGE, (inland,) draft, or order for the payment of any sum of money not exceeding one hundred dollars, otherwise than at sight or on demand, or any promissory note, (except bank notes issued for circulation, and checks made and intended to be forthwith presented, and which shall be presented to a bank or banker for payment,) or any memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid on demand. or at a time designated, for a sum not exceeding one hundred dollars, five cents.

And for every additional hundred dollars, or fractional part thereof in excess of one hundred dollars, five cents.

3. BILL OF EXCHANGE, (foreign,) or letter of credit, drawn in but payable out of the United States, if drawn singly, or otherwise than in a set of three or more, according to the custom of merchants and bankers, shall pay the same rates of duty as inland bills of exchange or promissory notes.

If drawn in sets of three or more: For every bill of each set where the sum made payable shall not exceed one hundred dollars, or the equivalent thereof in any foreign currency in which such bills may be expressed, according to the standard of value fixed by the United States, two cents.

And for every additional hundred dollars, or fractional part thereof in excess of one hundred dollars, two cents.

In investigating the principle upon which the above taxation is graduated, we assume that the instruments included above under number 3, come within the same principle that governs those of number 2, it being obvious that the exception in the former class of bills in sets, is such only because of the arithmetical difficulty of dividing a stamp-tax of five cents among *three* instruments; for which reason *six* was taken as the nearest whole number equally so divisible.

Bearing this in mind, it will be seen that, of the instruments promising or ordering the payment of money, the great mass are taxed at *five cents* on each hundred dollars, and fraction thereof. All *foreign bills of exchange* are so taxable, and all *promissory notes;* so all *inland bills of exchange* and *drafts* and *orders payable*

otherwise than at sight or on demand, and any *memorandum*, *check*, *receipt*, or *other printed or written evidence* of an amount of money to be paid on demand or at a time designated.

Those taxable at *two* cents form the exception to the rule, being *bank checks*, *drafts*, or *orders* for any amount drawn upon banks, bankers, or trust companies, or such instruments for more than ten dollars drawn upon any other person at sight or on demand.

Of instruments payable *at sight* (which is the characteristic of that before the court,) some are within the former, and some within the latter class.

Under the former come *foreign bills* and *promissory notes*, *memoranda*, *checks*, *receipts*, or other *written or printed evidences*, etc. Under the latter come *bank checks*, *drafts*, or *orders* for the payment of money on bankers or others (with some exemptions.)

The instrument before the court is not a *bank check*, a *receipt*, or a *draft upon a banker*, and is not drawn in a set or for a sum exceeding ten dollars. It is, therefore, liable to a *five cent* stamp, or to *none*, according as it may be, upon the one side, a *foreign bill*, a *promissory note*, a *memorandum*, *check*, or *printed* or *written evidence*, etc.; or, upon the other, *a draft* or *order upon* a *person other than* a *banker*.

I. The special verdict is liable to two observations, neither of which, we submit, is sufficient to prevent a response by this court to the question about which the judges below differed:

(a.) The information charges that Buzzo acted as *clerk*, whilst the verdict finds that he was *superintendent*. This variance may be gotten rid of by an amendment in the court below, (this not being an *indictment*,) in case the certificate to be transmitted be in favor of the Government.

(b.) The verdict is silent as to the "*intent*" of the defendant, *charged* in the information, and *required* by the statute. The facts (supposing the instrument to be liable to a stamp) show that the defendant has *actually*

evaded the provisions of the act. In a similar case this court has said, (*United States* vs. *Kirby*, 7 Wall., 482,) "When the acts which create the obstruction [evasion] are in themselves unlawful, the intention to obstruct [evade] will be imputed to their author, although the attainment of other ends may have been his primary object." This is in accordance with long-established principles. (*Rex* vs. *Furnival* and *State* vs. *Jones*, as reported in White & Bennett's Lead. Cr. Cases, 2d vol., 45, with notes.)

To the same effect is a passage in Tidd's Practice, 2d vol., 897: "And if a special verdict on a mixed question of fact and law, find facts from which this court can draw clear conclusions, it is no objection to the verdict that the jury have not themselves drawn such conclusions, and stated them as facts in the case."

Whatever may be the true doctrine in a case where the special verdict finds only such *evidence* as, in the judgment of a court, makes it competent for a jury to decide either positively or negatively as to a fact in question, it seems that if the evidence so found be such as should form the basis of an instruction by the court that from it the jury *must find* in a particular way, it is immaterial whether the jury find the specific fact, or only the *proofs* of it.

That is the case here.

II. Upon casual inspection the instrument might be regarded as a foreign bill, it being an unconditional written order for the payment of a sum certain of money, drawn in Michigan upon a person in Boston. (Byles, p. 1; 2 Pet., 586.)

In order to give effect to every word in the above statute, the expression under number 1, "draft or order," must mean such draft or order as is not a bill, to wit, such as is not for an absolute payment of money, or is payable out of a *fund*, &c.

So far, if we were to be held to the mere exterior of the instrument.

But the question is, as to the character of the instrument upon the "facts stated in the special verdict."

According to these facts, the drawer and drawee were, at the time of issue, officers of the Calumet Mining Company, duly authorized to draw such paper in favor of laborers and other such creditors of the company; and this instrument was made in the usual course of business. It was part of a large series ("6408" of this particular amount,) each number of which was for a sum *usual in paper issued for currency*, and a portion thereof was, as the defendant knew when he issued this paper, so used in the vicinity of the mine. Rather more than four-fifths of this issue was in bills of twenty, fifty, and one hundred dollars, and about that proportion of the issue went forward to Boston in due course of mail after its issue, leaving a proportion of bills which became currency in the vicinity of the mine, about equal to the proportion of small bills, that is, of such as were of a size calculated to meet the probable requirements for currency of miners and other laborers. The paper was made payable by Seabury, as *treasurer*, to the order of Buzzo, *superintendent*, and drawer; but was issued, and circulated, and paid without indorsement, the system of accounts apparently requiring, instead of an indorsement, a notification of each issue from Buzzo to Seabury, through the mail.

It appears, therefore, that whatever be the legal designation of the instrument, it is a mere written acknowledgement of a debt, by the Calumet Mining Company, with a promise to pay it. The company admits upon the face that it had received value, and orders its treasurer (that is, itself) to make payment accordingly.

The presence upon its face, from the very origin of the instrument, of an absolute promise to pay by a drawee, is a criterion by which instruments, regular and irregular, which are of the class of promissory notes, are distinguished from those which are of the class of bills of exchange. A bank check, draft, or order for money, drawn at sight, is at the time of its issue, (which is the important time as regards stamp duties,) no evidence of an amount of money payable at sight: As regards the

drawee's liability, it is at that time no evidence whatever: As regards the drawer's, it is evidence of a contingent promise, viz, that if there be a presentation, etc., etc., he will pay.

The *language of the statute* requires us to distinguish such papers as are *evidences of an amount of money to be paid at sight*, from such as are merely *drawn at sight*; the former being subjected to a stamp of *five* cents, the latter to one of *two*, or, if below a certain amount, *exempted*.

As regards authorities, it seems plain that the numerous cases in which it was not important to consider whether the particular instrument before the court was not a note, or in which, under the pleading therein, *ut res magis valeat quam pereat*, it was necessary to treat an irregular paper as a bill, and in which, therefore, such instrument is spoken of and treated generally as such, (inasmuch as upon its face, it contained *an order* to pay,) need not be controverted. The instruments were bills, although something more, and in cases circumstanced like those, it was a sufficient *certainty* in the court to treat them as bills.

Blackstone (Book II, pp. [468, 470]) tells the student of law that "the payee, either of a bill of exchange or of a promissory note, has clearly a property vested in him, (not indeed, in possession, but in action,) by the *express* contract of the drawer in the case of a promissory note, and in the case of a bill of exchange by his *implied* contract;" and "in this case, [that of a note,] as there is no drawee, there can be no protest for non-acceptance, or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself and accepted at the time of drawing." *Byles*, after saying, (p. 10, ed., 1870,) "No precise words of contract are necessary in a promissory note, provided they amount in legal effect to an unconditional promise to pay," adds, (p. 91,) "If a man draw a bill on himself, it may be treated by the holder as a note; so may a bill drawn by a banking company in one place on the same banking company in another place." (1 Parsons, bills & notes, p. 62, is to the same effect.)

Miller vs. *Thompson*, 3 Man. & Gr., 576, is a leading authority upon this point, and the language of the court is stronger than that in Byles and Parsons, which purports to be founded upon it.

In *Allen* vs. *The Sea, Fire, & Life Assurance Company*, 9 C. B., 574, an order by certain directors of a company upon its cashier, to credit the plaintiff with a certain sum of money on account of the company, was declared upon as a promissory note, and after a verdict for the plaintiff, leave was reserved to the defendants to move to enter a verdict for themselves, if the court should think the objection well founded. After argument, the court said, "It appears that the instrument contains all that is essential to constitute a promissory note."

In *Fairchild* vs. *The Ogdensburg Railroad Company*, 15 N. Y. R., 337, the language of the court is very strong to the same effect. See also *Hasey* vs. *The White Pigeon Company*, 1 Douglas, p. 193, decided in 1843, in the State (Michigan) in which the instrument before the court was issued.

At all events, considering the circumstances under which this paper was issued, it may with an exact propriety be described as a *memorandum, check*, or *other written or printed evidence of an amount of money to be paid on demand ;* which the statute requires to be stamped as promissory notes are.

GEORGE [redacted]. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor General.

No. 130—2

Phillips

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES
vs.
THOMAS W. BUZZO. } No. 130.

On a Certificate of Division of Opinion between the Judges of the Circuit Court of the United States for the Eastern District of Michigan.

BRIEF OF DEFENDANT.

B. R. CURTIS,
J. HUBLEY ASHTON,
Of Counsel.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES
vs.
THOMAS W. BUZZO. } No. 130.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF OF DEFENDANT.

THE CASE.

The defendant was charged by a criminal information, filed Feb'y 28th, 1871, under section 158 of the Internal Revenue Act of June 30th, 1864, as amended by section 9th of the Act of July 13th, 1866, in different counts, with making, signing, and issuing, and with signing, a certain instrument, variously styled in the information "a certain written and printed evidence of an amount of money to be paid at a time designated *in the form of a draft;*" and "a certain instrument *in the form of a draft,*" upon which a stamp tax, as alleged, was imposed by law, without the same being duly stamped, with *intent* to evade the provisions of the acts of Congress relating to internal revenue, as amended by the Act of July 13th, 1866.

Act June 30th, 1864, sec. 158, 13 Stats., 293.

Act July 13th, 1866, sec. 9, 14 Stats., 142.

The Act of July 13th, 1866, amendatory of the 158th section of the Act of June 30th 1864, provides:

"That any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper, of any kind or description whatsoever, or shall accept, negotiate, or pay, or cause to be accepted, negotiated, or paid, any bill of exchange, draft, or order, or promissory note for the payment of money, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, *with intent to evade the provisions of this act*, shall for every such offense forfeit the sum of fifty dollars, and such instrument, document, or paper, bill, draft, order, or note, not being stamped according to law, shall be deemed invalid and of no effect."

The jury found a special verdict, and, on the motion of the United States for judgment against the defendant, the judges divided in opinion upon the question which they have certified to this court for its decision thereon, to wit: "Whether, upon the facts stated in the special verdict, the instrument set forth in the information was subject to a stamp when issued, under the internal revenue law of the United States."

The special verdict finds that, at the time of the making and issuing the paper set forth in the information, defendant was the Superintendent of the Calumet Mining Company, organized under the laws of Michigan, and engaged in copper mining at Calumet, in Houghton county, in that State.

He resided at the mine of the Company, who kept its general office and the principal part of its funds in Boston, where its treasurer, Charles W. Seabury, resided and had his office.

On June 25th, 1870, defendant made, in behalf of the Company and in the usual course of its business, the paper in question, to wit:

TEN.

No. 6408. CALUMET MINING COMPANY,
CALUMET, MICH'N, *June* 25, 1870.

At sight pay to my order ten dollars, value received, and charge the same to account of

T. W. BUZZO, *Clerk.*

CHA'S W. SEABURY, DELANO.
Treas., 114 *State st. Bos'on.*

The finding is, "that in the fall of 1866 said Company, by its superintendent, began to draw drafts of like tenor to the one set forth in the information, but in sums of five, ten, twenty, fifty, and one hundred dollars, and continued to do so down to the twenty-fifth day of June 1870.

"That none of those drawn for five or ten dollars were stamped, but all the others were stamped with a two-cent stamp on each."

This paper was only made and issued to pay for labor and other debts incurred at the mine.

None of it was ever paid by the Company, or received back, or taken up, or redeemed by it, at the mine, or at any other place, except at the treasurer's office in Boston.

None of it was ever received by the Company, nor had it or the defendant anything to do with its use, after it was issued.

It usually came to the Boston office for payment through the banks, and about four-fifths of it came by due course of mail, after being issued, and almost as soon as the notice which was at once given, upon the issuing of any of the paper, to the Boston office.

The Company was ready to pay and did pay all of the paper on presentation at the treasurer's office in Boston.

It is found that when defendant issued said paper, he knew that a portion of it was for a time retained in Houghton county, and passed from hand to hand as a circulating medium, but that defendant had no other agency therein.

It will be observed that the special verdict does not find that the paper referred to, or any of it, was designed and intended for circulation, or to be used as a circulating medium.

It will be also and more especially observed, that the special verdict does not find that the instrument in question was issued, or caused to be issued, without a stamp, *with intent to evade the provisions of the act of Congress.*

ARGUMENT.

FIRST.

No judgment for the United States can be entered by the Circuit Court upon the special verdict found in the record, and, therefore, this Court will not decide the question upon which the Judges of that Court have divided in opinion, and will remand the cause to that Court either with directions to award a new trial or without any direction.

I. The act of Congress (*supra*) expressly makes the *intent* to evade the provisions of the act a necessary ingredient of the offence defined by it. It is clear that it was necessary that the information should contain an allegation, as it does, that the omission of the stamp was with *intent* to evade the act, and that the jury could not have found the defendant guilty of the offense without finding an intentional omission of the stamp with the purpose of evading the act.

The special verdict, however, is entirely silent in regard to the matter of the intent of the defendant.

It does not find that, if the instrument was liable to stamp duty, it was issued without a stamp with intent to evade the act; and, therefore, however this Court might answer the question certified for its decision, the Circuit Court could not enter judgment for the United States upon the verdict.

This Court and all the State Courts which have given construction to the act, so far as we are aware, have decided that it is a fraudulent and not an innocent omission at which the penalty of the statute is levied.

Campbell *vs.* Wilcox, 10 Wall., 422.

This view was well expressed by the Supreme Court of Ohio, in the case of *Harper* v. *Clark*, (17 Ohio State, 192,) where the Court said: "The only purpose of the section is

to define an offense, and to declare what shall be the penalty for committing the offense. The penalty imposed is as much the forfeiture of the unstamped instrument as it is the sum of two hundred dollars. The offender is equally subjected to both penalties. But before he can be subjected to either, the offense must be committed. There is no offense unless the stamp be omitted 'with intent to evade the provisions of this act.' It is only 'for every such offense' that the penalty is incurred."

The following cases in other States are precisely to the same effect:

Hitchock *v.* Sawyer, 39 Vt., 412.
Tobey *v.* Chipman, 13 Allen, 123.
McGovern *v.* Hoesback, 53 Penn., 176.
Dudley *v.* Wells, 55 Maine, 146.

II. This court has said that where, in a special verdict, the essential facts necessary to a judgment upon the verdict are not distinctly found by the jury, it will not decide any questions upon which the opinions of the Judges of the Circuit Court were opposed, and will remand the case to that Court, with directions to award a *venire facias de novo.*

Barnes *v.* Williams, 11 Wheaton, 416.

Where the Circuit Court has entered judgment on a special verdict, which is brought before this Court by writ of error, this Court, if it discover that the essential facts are not distinctly found, or are defectively found, by the jury, will not render a judgment upon such imperfect special verdict, but will remand the cause, with directions to the court below to award a *venire de novo.*

Prentice *v.* Zane's Administrator, 8 How., 485.
Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268.

III. Whether, upon this special verdict, the defendant is entitled to a judgment, wholly irrespective of the character of the paper, because the special verdict does not find the essentially necessary intent, seems to be a question which does not arise here under the certificate of division of opin-

ion. It is enough that the question certified is a moot question on this record.

IV. It has been said that the question for the Court on a special verdict bears a strong analogy to that which is raised by a demurrer to evidence. (Gould's Pleading, chap. X, sec. 12.) And it has been long settled in England, that on a writ of error to a judgment rendered upon a demurrer to evidence, the appellate court will reverse the judgment and award a *venire facias de novo*, if the facts which the evidence conduced to prove have not been clearly and certainly admitted on the record by the demurring party.

In Gibson *v.* Hunter, (2 H. Black., 187,) which was an action by holder against acceptors of a bill, payable to a fictitious payee, or order, the question of fact in issue was whether defendant *knew* the payee to be fictitious. The defendant demurred to plaintiff's evidence tending to show *knowledge*, without admitting expressly that fact. The House of Lords, by the unanimous opinion of the judges, resolved, that because defendant's knowledge of the payee's being a fictitious person (the great point of fact in issue) was not expressly admitted on the record, the point of law intended to be raised by the demurrer could not arise, and consequently that no judgment could be given upon the demurrer; and that another *venire* must issue.

Lord Ch. J. Eyre, in delivering the unanimous answer of the judges to the House of Lords, said: "The issue joined between the parties in effect has not been tried, and the case of *Wright* v. *Pindar* (Allyn's Rep., 18) is expressly in point that another *venire facias* should issue."

SECOND.

The instrument in question is within the designation of a draft, or order for the payment of a sum of money, in the sense and meaning of the Internal Revenue Act of June 30, 1864; and as it was for the payment at sight of a sum not exceeding ten dollars, and was not drawn upon any

bank, banker, or trust company, it was not subject to a stamp duty under that act.

The act (13 Statutes, 298) provides, that there shall be paid, for and in respect of the several instruments and things mentioned and described in Schedule B, the several duties therein specified.

That part of the schedule which will be for consideration here is as follows:

"Bank-check, draft, or order for the payment of any sum of money whatever, drawn upon any bank, banker, or trust company, or for any sum exceeding ten dollars drawn upon any other person or persons, companies or corporations, at sight or on demand, *two* cents.

"Bill of exchange, (inland,) draft, or order for the payment of any sum of money not exceeding one hundred dollars, otherwise than at sight or on demand, or any promissory note, (except bank notes issued for circulation, and checks made and intended to be forthwith presented, and which shall be presented to a bank or banker for payment,) or any memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid on demand, or at a time designated, for a sum not exceeding one hundred dollars, *five* cents.

"And for every additional hundred dollars or fractional part thereof in excess of one hundred dollars, *five* cents."

It will be seen that certain well-known instruments, having the character and qualities of mercantile paper, are here first designated, and that afterwards the schedule proceeds to name and describe other writings, which do not possess ordinarily the character and qualities of mercantile paper, and operate merely, in the language of the schedule, as "evidence of an amount of money to be paid on demand or at a time designated."

The schedule catalogues the various instruments and writings to be taxed by the well-known names and descriptions of the paper, and specifies the amounts of duty in substance as follows:

1st. Every bank check..... 2 cts.
2d. Every draft or order for the payment of any sum of money *at sight or on demand*, (except where the draft or order is so

drawn on a person, company, or corporation other than a bank, banker, or trust company, and for a sum not exceeding ten dollars, when it is *exempt*)..... 2 cts.

3d. Every bill of exchange, draft, or order for the payment of any sum of money *otherwise* than *at sight or on demand*, for every one hundred dollars..... 5 cts.

4th. Every promissory note..... 5 cts.

5th. Every memorandum check, (as the act should be read,) receipt, or other written or printed evidence of an amount of money to be paid on demand or at a time designated, for a sum not exceeding one hundred dollars ..... 5 cts.

It is quite clear that the words "memorandum, check," in the 5th subdivision, should have been written with a hyphen, instead of a comma. It is evident that the intention was to provide for what Judge Story speaks of as "a class of checks which has recently sprung up in our commercial communities of a peculiar character, and known as memorandum checks." (Promissory Notes, sec. 499.) A memorandum-check is a common bank check, with the word "*memorandum*" or "*mem.*" written or printed upon it.

Parsons says, "there is a well-known custom in all our commercial cities of drawing and using checks in this form merely as due bills, or, as what they are called and are, memorandum checks." (2 Notes and Bills, 66.)

When Story wrote his *Promissory Notes*, as he states, they had not given rise, within his knowledge, to any important judicial decisions. "Between the parties," he says, "they seemed designed as a mere memorandum of an indebtedness, generally for money borrowed, and are in the nature of a common due bill, I. O. U."

In New York it has been held, that if the name of the bank is not canceled on the check, the holders of a memorandum check *may* present it to, and demand payment of, the bank. (Dykers *v.* Leather Manufacturer's Bank, 11 Paige, 615.) In that case the custom of Wall street was shown to be to treat the word *mem.* on a check as "an understanding that the check is not to be presented immediately for payment, so as to destroy the drawer's credit with the bank, where he has not provided funds to meet it."

In Massachusetts the *bona fide* holder of a memorandum check may sue the maker without presentment at the bank.

(Franklin Bank *v.* Freeman, 16 Pick. 535.) Putnam, J., in that case, speaks of the rules of business with regard to memorandum checks as "perfectly understood" in the commercial community of Boston. (See also Kelly *v.* Brown, 5 Gray, 108.)

In Charleston, South Carolina, memorandum checks being regular bank checks, with the word "memorandum" written on their face, are constantly used in settlement of accounts among tradesmen, as admissions of amounts due. (Glover *v.* Graeser, 10 Rich. Eq., 442.)

If the word "*check*" in the 5th subdivision (*supra*) is to be read without the word "memorandum," it is plain that two rates of duty are imposed by the schedule on what are known as bank checks. There is no other definition of a check than that it is a brief draft or order on a bank, banker, or banking-house, directing him or it to pay a sum of money. (2 Parsons, 57.)

"Checks," says Judge Story, "are *always* drawn on a bank or banker." (*In re* Brown, 2 Story, 512.)

"This," he says, "is one of their distinguishing characteristics, as contradistinguished from bills of exchange." In his work on Promissory Notes he defines a check in the same way. (Section 487.)

Chitty also defines a check to be a written draft or order on a bank or persons carrying on the business of banking. (Chitty on Bills, p. 511.)

If the term check, as here used, is not construed to mean "memorandum check," it is clear that what are known as bank checks are taxed five cents each in one place and two cents in another place in the schedule.

There is but one kind of check besides the regular bank or bankers' check, and that is the memorandum check; and if we suppose that Congress intended to tax checks of *that* sort, the statute is harmonious and sensible.

It is observable that the schedule speaks particularly of every memorandum check, receipt, and then generally of other written or printed evidence of an amount of money to be paid on demand, &c.

A memorandum check is that very thing, according to the use customarily made of such paper, as stated by Story and Parsons, in our mercantile communities. It is a simple evidence of indebtedness, and in the nature of the common due bill or I. O. U.

A check is different from and more than that. It is a commercial instrument, like a promissory note and a bill of exchange or draft, which may be declared on like a specialty, and is not simply an acknowledgment of indebtedness to support a count for money had and received.

The class of writings intended to be provided for in the 5th subdivision (*supra*) undoubtedly was paper which has no other operation than being mere evidence of a debt, like the common memorandum, "I. O. U. such a sum;" all the regular commercial instruments having been before specially designated and taxed or exempted from duty.

II. This instrument is in *form* and in *fact* a draft or order for the payment of a sum of money at sight, and it comes, therefore, under *that* designation, and cannot be deemed and held to be within any other designation, in the statute.

The schedule contains the precise designations of the objects of taxation; and whatever comes under one of these designations is something different from the paper intended by the other.

By promissory notes are intended instruments which are *not* drafts; and by written or printed evidences of an amount of money to be paid on demand or at a time designated are meant such evidences as are neither drafts nor promissory notes, notwithstanding both might be used as evidence of money payable. If a paper is found to correspond accurately to the designation of a "draft" or "order for the payment of a sum of money," taxed at two cents, it cannot be placed under the designation of "written or printed evidence of an amount to be paid," and taxed at five cents, merely because extrinsic proof may show that it is evidence of such a fact.

This proposition is the statement of a plain and well-settled rule of construction.

That the fifth class of papers, designated as evidences of money to be paid, are, in the intent of this revenue statute, papers which differ from drafts or orders for the payment of money—papers, in a word, which depart from the forms of regular mercantile instruments—is rendered evident by reference to the previous legislation on this subject.

The first Internal Revenue Act of July 1, 1862, (12 Stats., 480,) provided as follows:

"Bank checks, drafts, or orders, for the payment of any sum of money exceeding twenty dollars, drawn upon any bank, trust company, or any person or persons, companies or corporations, two cents.

"Bill of exchange, (inland,) draft, or order for the payment of any sum of money exceeding twenty and not exceeding one hundred dollars, otherwise than at sight or on demand, or any promissory note, except bank notes issued for circulation, for a sum exceeding twenty and not exceeding one hundred dollars, five cents."

Briefly stated, these two clauses imposed different duties upon certain *bank checks*, *drafts*, *bills of exchange*, *orders for the payment of money*, and on *promissory notes*.

These were the specific designations of certain well-known classes of instruments.

It was found that they wholly failed to describe or designate a certain other well-known class of papers which were constantly used in business, but which were not commercial instruments according to the law merchant. These were, for example, memorandum-checks, receipts for money, due bills, (I. O. U.,) and other evidences, to which the ordinary rules of the law merchant do not apply.

Congress, finding that these evidences had been omitted from the Act of 1862, undertook, by the 6th section of the Act of March 3, 1863, (12 Stats., 720,) to add them as entirely *new* objects of taxation.

It is plain that the text was incorrectly punctuated, or that a comma instead of a hyphen was inadvertently placed between the words "*memorandum*" and "*check.*"

Correctly stated, the 6th section of the Act of 1863 is as follows: "Any memorandum-check, receipt, or other written or printed evidence of an amount of money to be paid on demand or at a time designated, shall be *considered* as a promissory note within the meaning of that section, and shall be stamped accordingly."

This amendment amounted in substance to saying that "inasmuch as memorandum-checks, receipts, and other like evidences of money to be paid, are different from the instruments now designated in the internal revenue laws, and are, therefore, not now subject to tax, they shall hereafter, for the purposes of the Act of 1862, be considered as promissory notes, and thus taxed five cents."

This amendment was a declaration that the new class of papers now added to the list were such evidences of money to be paid as were not *drafts* or *promissory notes*. In other words, although drafts might, in certain cases—that is, when accepted—be evidences of money to be paid, still they did not thereby belong to this new class. They already belonged, whether accepted or not, to the classes taxed by the Act of 1862. It was only papers which departed from the forms of mercantile paper, and which had by such departure escaped taxation, that were now intended to come within the new class.

The Act of June 30, 1864, instead of directing that the new class of taxed papers, called evidences of money to be paid, should, for the purposes of taxation, be known under the name of promissory notes, set these new papers down under their own specific names. But they were still, as before, set down as something additional to, and different from, drafts, orders for the payment of money, and promissory notes. The interpretation of the character of this new class was not in the least affected by the altered method of placing them.

It was still intended by the statute that papers which did not depart from the forms of mercantile paper did not belong to the newly-added class, inasmuch as they were already taxed by their own designations.

We claim that the paper issued by the Calumet Mining Company is of a kind that falls within the class taxed as regular mercantile paper payable at sight, and is not of the new class which was added by the act of 1863.

There is a clear and absolute test of this proposition.

Suppose this very case had arisen under the act of 1862, upon drafts exceeding twenty dollars, and that the defendants had set up the defence that they were not drafts or orders for the payment of money within the meaning of the act of 1862, but were merely evidences of money to be paid, which were not named in that act.

It can hardly be doubted that this Court would have held that they were clearly and accurately described by the terms of the act of 1862, and must bear a two-cent stamp.

If these papers would have been held to fall within that clause, as it stood in the act of 1862, it follows that they must be held to fall within the same clause when it is repeated in the act of 1864.

It is not admissible to say that they were drafts or orders for payment then, and taxable as such, but are not drafts or orders now.

They are not to be taken now, by any process of construction, out of the class to which they were for several years admitted to belong, and shifted into what was confessedly a new and different class from that to which they had belonged.

Any thing which *can* be taxed as a draft, or order for payment of money, *cannot* be taxed as an "evidence of an amount of money to be paid."

III. That paper in the form of the instrument attached to the information can be taxed as drafts or orders for the payment of money, in other words are actually drafts or orders, admits of no question.

English cases, English and American text-books, and American cases, decided in New England, in the West, and in the South, show that they have long been held to possess completely the character of drafts in the sense of

the law merchant and in the popular sense of the term, and that this doctrine has been generally accepted throughout the country.

As a rule of interpretation, it must be supposed that Congress intended to embrace within these designations of mercantile instruments whatever had been thus universally held to belong to those several classes.

The instrument in question is a draft by one person upon another person.

This is true, even if it is held to be a draft or order by the Company upon its treasurer.

In 1844, in *Kaskaskia Bridge Co.* vs. *Shannon*, (1 Gilm. Ill. R., 15,) when the Bridge Company had drawn drafts on its treasurer thus: "To the treasurer of the Kaskaskia Bridge Company," the court said: "The circumstance of the defendants having drawn it upon their own treasurer, as admitted on record, does not change the nature of the instrument nor the rules of law applicable to it. The drawer and drawee may be the same person in a bill of exchange."

In 1855, in the *Marion and Mississinewa Railroad Co.* v. *Dillon*, (7 Porter, Ia., 404,) it was held, that where a debt is due from a corporation, and it is the duty of one officer, or set of officers, to allow demands, and draw upon another officer, who has the custody and is charged with the duty of the disbursement of the funds for payment, the order is a draft, and must be *presented, as a general rule, in a reasonable time, for payment.* In that case the drafts were in the form of scripts for small sums drawn on "The Treasurer" of the Company; and the court held, as just stated, that they should have been presented in a reasonable time to the treasurer for payment.

But the best authorities have gone much further than this.

Chitty (Bills, 24) says, a bill will be valid where there is only *one* party to it; for a man may draw upon himself payable to his own order.

Story says, "the drawer may at once become a drawer, payee and drawee." (Bills of Exchange, sec. 35.) He con-

trasts the French law with "our law;" and says, citing Pardessus and Pothier, that it differs from the English and American law in this respect.

Parsons says: "it is not absolutely necessary that the drawee should be a different person from the drawer. For it is *very common* for a man to draw upon himself, and it has long been held that such an instrument is a good bill of exchange." (1 Notes and Bills, p. 62.)

In 1839 Mr. Justice Story considered this subject judicially; and in the case of *Wildes* v. *Savage*, (1 Story, 22, 29,) observes: "When the bill is negotiable, and contains a drawer, a payee, and a drawee, it is, in a commercial sense, a bill of exchange, although one or more of the parties should fill a double character. It is of no consequence in such a case what particular individuals represent the dramatic personages."

So, in 1835, it was held in Maine, in *Cunningham* v. *Wardell*, (3 Fairf., 466,) that a bill drawn by a person upon himself was a bill of exchange.

The same doctrine was applied in Alabama in the case of *Randolph* v. *Parish*, (9 Porter, 76,) decided in 1839.

IV. If a statute of the United States uses a term which is known, and its meaning fully ascertained in the department of the law to which it belongs, and from which it is obviously borrowed, the legal import of the term is the same in which it must be supposed to have been used by the Legislature, unless the context shows that a different sense was in fact intended.

U. S. *v.* Curtis, 4 Mason, 236.
U. S. *v.* Jones, 3 W. C. C., 215.

The adjudged construction of the terms of a statute are enacted as well as the terms themselves; and it will be presumed to have been known to the legislature.

Ruckmaboye *v.* Mottichund, 32 E. L. & E., 90.
Comm *v.* Hartnett, 3 Gray, 451.

V. It will be noticed further, that the draft here in

question is expressly made payable *at sight*. However construed, it is not an "evidence of an amount of money to be paid on *demand*, or at a time *designated*." Days of grace are allowable on bills payable *at sight*. (Story on Bills, sec. 342; Chitty on Bills, ch. 9, p. 407.) This bill is not payable on demand, and clearly not at a time *designated*, in the sense of the statute.

THIRD.

The statute should not be construed to extend to instruments not coming clearly within it; nor should any instrument fairly described by one clause be subjected to the more burdensome provision of another clause, unless it evidently appears that it was intended to be governed by the latter.

I. The rule of construction applicable to a statute of this character was well stated by the judges of the Supreme Court of New York in 1802, when Kent and Thompson and Livingston were on the bench, in a case arising under the Act of July 6, 1797, involving the question whether a bank check was required to be stamped, (Conroy *v.* Warren, 3 Johnson's Cases, 259.) Justice Kent said: "The act specifies only bonds, foreign or inland bills of exchange, promissory notes, or other notes for the security of money. The act is to be taken strictly, and none of these expressions will reach the case of checks, as they do not strictly and technically answer either of those descriptions; and it is a rule of construction, that when a statute, and more especially a statute with penalties for neglect, specifies particulars, all particulars not enumerated are excluded." Justice Thompson said: "The statute imposing these duties, in describing the instruments required to be stamped, says, 'any bonds, bills, single or penal, foreign or inland bills of exchange, promissory notes, or other notes for the security of money,' &c. Checks are a species of paper so common, and in such general use and circulation, that it is fairly to be presumed that, if it had been

the intention of the legislature to include them, they would have been described by their appropriate and universal name. A check is not, in common parlance or in mercantile language, a note for the security of money. It is a draft or order for the payment of money; and I believe it has never been contended that a mere order or request to pay money requires a stamp. In the English stamp act checks, drafts, and orders are particularly mentioned; and this affords a strong presumption that they were not intended to be included in the act of Congress. I think the statute ought not to be construed to extend to instruments not coming clearly within it."

II. The rule of the English courts has long been, that if there is any doubt as to the meaning of the Stamp Act, to construe it in favor of the subject, "*because a tax cannot be imposed without clear and express words for that purpose.*" (Pollock, C. B., in Gurr *v.* Scudds, 11 Exch., 191.)

In the spirit of this principle the courts of England have decided that, instruments falling within the Stamp Acts are to be dealt with only as they appear on their *face*, without reference to collateral circumstances by which their apparent operation may be affected.

Thus, where by post-dating a bill the proper duty is evaded, this, though it subjects to a penalty, does not make a higher stamp necessary; and this on the ground that the word *date* in the Stamp Acts means the date on the face of the bill.

Williams *v.* Jarret, 5 B. & Ad., 32.

In determining what is the requisite stamp on a draft payable to order "on demand," so as to make it admissible in evidence, the instrument alone is to be looked to; and if it is post-dated, and becomes thus equivalent to a bill at so many days' date as intervene between the day of delivery and the date marked on the draft, it does not become, within the meaning of the act, a draft payable at a time *otherwise* than on demand.

Whistler *v.* Forster, 14 C. B., (N. S.,) 248.

Affirmed by Queen's Bench, in 1871, in *Bull* v. *O'Sullivan*, (6 Law R., Q. B., 212.)

FOURTH.

This instrument cannot be legally construed as a draft or order by the Company upon itself; and, therefore, it cannot be considered as in legal effect a promissory note, or an evidence of debt, as claimed on the part of the Government.

I. The drawee, Charles W. Seabury, is described on the face of the draft as "*Treas.*" which we may concede is an abbreviation of the word "Treasurer." But the name of the individual, company, or corporation, for whom he acted in that capacity, is not disclosed anywhere upon the face of the paper. The words "Calumet Mining Company," at the top of the bill, do not necessarily, or even *prima facie*, indicate that he was the treasurer of that Company. *Non constat* he was not the treasurer of some other company or corporation not named, or indicated on the face of the draft.

The effect of the words at the top of the draft may be different in the case of the *drawer*. They may qualify *his* liability, by disclosing the principal for whom it may be reasonably inferred he acted in signing the instrument. But they do not tend to show that the drawee was the treasurer of the Calumet Mining Company, and that the intention was to draw upon him in his official capacity as treasurer of that particular corporation.

If "Charles W. Seabury, Treasurer," therefore, had accepted the draft, the Company could not have been charged, and Seabury could not have been protected from liability, upon that contract.

Upon such an acceptance of the draft, parol or extrinsic evidence would have been inadmissible to prove that the acceptor was in fact the treasurer of the Calumet Mining Company, for the purpose of charging the Company with liability on his contract.

It cannot be of any legal consequence or value, therefore, in giving interpretation to the instrument, that the jury have found, in their special verdict, that Seabury was the treasurer of the Calumet Mining Company.

The foregoing reasoning accords fully with the doctrines of the Supreme Court of Massachusetts in the case of *Slawson* v. *Loring*, (5 Allen, 340.)

The suit there was against the acceptor of a draft substantially in the following form:

"OFFICE OF PORTAGE LAKE MANUFACTURING COMPANY,
"HANCOCK, MICH., *June* 15, 1861.

"E. T. LORING, *Agent*, 39 *State st.*, *Boston.*

"At four months' sight pay to the order of J. H. Slawson four hundred dollars, and charge the same to the account of this Company.

$400. J. R. JACKSON, *Agt.*

(Written across the face of the draft, "*Accepted June* 15. *E. T. Loring, Agent.*")

The only question was whether E. T. Loring was liable as acceptor. The Court held that there was nothing on the face of the draft to show that the defendant was not liable as acceptor, and that all evidence *de hors* the paper was to be excluded. The fact that the bill bore date at the office of the Company in Hancock, Michigan, and directed the drawee to charge the amount to the "account of this Company," the drawer signing his name as agent after these words, was held to disclose the principal for whom the drawer acted and intended to act; but the Court held that so much of the language of the instrument was appropriated and exhausted in qualifying the liability of the drawer.

"What, then," says Bigelow, C. J., "is left on the face of the drafts to show that the defendant is not liable as acceptor? Nothing, except the single circumstance that the address to him as drawee is printed in large capital letters at the top of the bills, with the addition of the word 'Agent.' This certainly does not necessarily, or even *prima facie*, indicate that he is the agent of the drawers. It is, to

say the least, equally consistent with the idea that he is the agent of some third person not named on the face of the bill. * * * But there is another and broader view of the contract into which the parties entered, which is strongly indicative of an intent by the defendant to be bound by his acceptance. The instruments declared on purport to be bills of exchange, having a drawer and acceptor. By putting the contract in this form, the intention of the parties must have been to issue paper, which should be received by those who took it in the usual course of business, according to the ordinary and legal effect which such form imports, as giving to the holder the security of the name of the parties. Otherwise, if they intended to bind one party only, it is reasonable to suppose that the bills would have been drawn by the Company on itself; in which case the direction and request to pay would have been on the Company by its name, and not on an individual described only as agent."

A distinction is almost universally recognized between commercial paper in the form of bills of exchange and negotiable promissory notes and other simple contracts, in respect to the admissibility of extrinsic evidence to charge unnamed principals.

The doctrine is, that when an agent signs negotiable paper without disclosing his agency on its face, or when it is addressed to him as agent and he accepts it in his own name, the holder must look to him alone. In other simple contracts the rule is different.

The rule excluding evidence *de hors* the paper, in the case of negotiable instruments, to charge any person as principal not disclosed on the face of the paper, rests on the principle that each person who takes it makes a contract with the parties on the face of the paper, and with no other persons whomsoever.

Taber *v.* Cannon, 8 Met., 460.
Fuller *v.* Hooper, 3 Gray, 341.
Barlow *v.* Cong. Society in Lee, 8 Allen, 462.

Where an agency is disclosed on the face of the bill, enough also must appear *there* to show who the principal was, and the *intention* of the agent was to bind the principal and not himself.

Bank of N. A. *v.* Hooper, 5 Gray, 573.
Carpenter *v.* Farnsworth, 106 Mass., 562.

If a note import a personal promise of the signer, and words descriptive of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office or agency, the agent is not exempt from personal liability.

Fiske *v.* Eldridge, 12 Gray, 476.
Haverhill Ins. Co. *v.* Newhall, 1 Allen, 130.
Sturdivant *v.* Hull, 57 Maine, 172.

The words, "agent of," "president of," "treasurer of" a particular corporation named, simply designates a personal relation of the individual to the corporation; and even "agent *for*" has been held under some circumstances a mere *descriptio personæ* of the agent.

De Witt *v.* Walton, 5 Selden, 570.
Shattuck *v.* Eastman, 12 Allen, 369.

Where a bill was drawn by persons signing themselves as "*agents*," with the name of the corporation annexed, and addressed to the corporation *itself*, and the name of the corporation did not appear in the body of the bill, it was decided, on a careful and full review of the authorities, by Mr. Justice Gray, that the drawers were personally liable.

Tucker Manf. Co. *v.* Fairbanks, 98 Mass., 102.

In the case of commercial paper payable to a person described as "cashier," it has been held, indeed, that the bank, although not named in the instrument, might maintain the action.

Baldwin *v.* Bank of Newbery, 1 Wall., 234.
Barney *v.* Newcomb, 9 Cush., 53.

But these decisions may be regarded as standing upon the peculiar relation between a bank and its cashier, or the general right of a principal to *sue upon* negotiable paper made to his agent.

II. The English cases recognize the same distinction between negotiable instruments and other simple contracts, with respect to the admissibility of parol evidence to charge unnamed principals; and hold, that where the principal's name does not appear, he is not liable on a bill or note as a party to the instrument.

Thomas *v.* Bishop, 2 Stra., 955.
Leadbitter *v.* Farrow, 5 M. & S., 345.
Mare *v.* Charles, 5 E. & B., 982.
Beckham *v.* Drake, 9 M. & W., 92.
Emly *v.* Lye, 15 East, 7.

III. It necessarily follows, from what has been said, that the Calumet Mining Company could not have been made liable upon any acceptance of this instrument. As the Company was not the drawee, it could not have accepted the draft. It is an elementary principle, that no one but the real drawee can accept, unless he accept for honor. (Byles on Bills, 118; Lord Denman in *Davis* v. *Clark*, 6 Q. B., 16; *Nichols* v. *Diamond*, 9 Exchequer, 154; *Mare* v. *Charles*, 5 Ellis & Blackburn, 982.)

If Seabury had accepted the draft, he would have been personally liable, or his acceptance would have been no acceptance at all. If he should have attempted to use words to exclude his personal liability, they would have been treated either as unavailing for that purpose, or simply as a refusal to accept. This is the clear doctrine of the Court of Queen's Bench in the case of *Mare* v. *Charles*, (5 Ellis & Blackburn, 982,) and the Court of Exchequer in the more recent case of *Alexander* v. *Sizer*, (4 Law Rep., Exch., 105.)

Sir Fitzroy Kelly, C. B., in the course of his opinion in the last case, said: "The acceptor, though he may purport to accept in some manner limiting his personal liability,

becomes liable if he does accept. He cannot vary or limit his liability on the contract, and by his acceptance of the bill, which is addressed to him, it becomes his contract, and words of mere description or qualification are not enough, according to the usage of merchants, to exonerate him. If express words of exclusion were to be used, the result might be different, but then his acceptance would in fact be no acceptance at all. Bills of exchange are all drawn on the intended acceptor in a personal character, and if he accept them, he must be held to have done so in that character, and will be held liable, no matter what words of mere description may be added to his name."

When a bill was addressed by the agent of a corporation to "John R. Livingston, Jr., President Rosendale M'ng Co., New York," indorsed to a party for wages due from the Company, and "accepted, John R. Livingston, Jr., President Rosendale M'ng Co.," the Court of Appeals of New York held that the acceptor was personally liable. The court said: "The Company might very properly have become bound by a bill to pay the plaintiff; but at the same time it was competent for their agents or officers to assume to pay in their stead; and there is nothing in the case or on the face of the bill itself which in judgment of law negatives such an intention on their part. The bill cannot be deemed the obligation of the Company. It does not purport to have been drawn on their behalf, nor was it addressed to them or accepted in their corporate name. They were not, therefore, bound by it." (4 Comstock, 208.)

The conclusion of the Court of Appeals in this case is the doctrine of the old case of *Thomas* v. *Bishop*, (2 Strange, 955,) which has been repeatedly and lately approved by the Supreme Court of Massachusetts, (Shaw, C. J., *Taber* v. *Cannon*, 450; Bigelow, C. J., *Slawson* v. *Loring*, 5 Allen, 345,) and other States, and has never been questioned in England.

IV. Independently, therefore, of any question as to the liability of this Company on this draft as drawer, it is clear

that no one could have become liable on it as acceptor, except Seabury; and that thus the entire premises of the argument on behalf of the United States fail, there being two distinct parties to the instrument.

V. In the case of *Miller* v. *Thompson*, (3 M. & G., 575,) relied on by the Government, the bill was drawn by the whole company, acting by their directors, upon the whole company. The drawers and drawees were identically the same persons.

FIFTH.

It is, perhaps, well to mention, as part of the history of this legislation, that by the Act of June 6, 1872, all the stamp duties in Schedule B, of act of 1864, were repealed, except only the tax of two cents on bank checks. The question, therefore, intended to be raised here can have no importance in the future.

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